

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-2172 ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ^{et al} EFRAIN
SANTIAGO,

** PLEASE RETURN TO **
** RECORDS ROOM **

Petitioner-Appellee,

-against-

Docket No.
76-2172

LEON VINCENT, Superintendent of
Green Haven Correctional Facility,

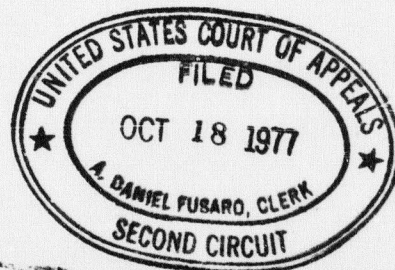
Respondent-Appellant.
-----X

BRIEF FOR RESPONDENT-APPELLANT

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

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Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Sworn to before me this
17th day of Jan

Julius Silverman

, 1977

Rosaline L.

Assistant Attorney General
of the State of New York

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UNITED STATES OF AMERICA ex rel. :
EFRAIN SANTIAGO, :

Petitioner-Appellee, :

Docket No. 76-2172

- against - :

LEON VINCENT, Superintendent of :
Green Haven Correctional Facility, :

Respondent-Appellant. :

-----X
BRIEF FOR RESPONDENT-APPELLANT

Question Presented

Did the District Court properly grant the habeas corpus application where the Court, after a hearing did not, and recognized that it could not, find by a preponderance of the evidence that a prosecution witness believed her brother to be a suspect in the homicide prior to describing the appellee to the police?

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Gagliardi, D.J.), dated September 12, 1977, which after a hearing on remand from this Court, adhered to its prior decision, dated November 30, 1976, which granted appellee's application for a writ of habeas corpus and ordered that he be discharged from custody unless the State of New York vacates the judgment of conviction against him and accords him a new trial within 60 days of the date of the issuance of the District Court mandate.*

Prior Proceedings

Petitioner was convicted in the New York State Supreme Court, New York County, after a jury trial, of the crimes of Murder and Possession of a Weapon as a misdemeanor. He was sentenced to an indeterminate term of imprisonment for life, with a minimum period of eighteen years on the Murder count and to a one year concurrent sentence on the Possession count.

* This mandate has been stayed by order of the District Court and this Court.

Petitioner appealed his conviction to the Appellate Division, First Department, claiming, inter alia, that the trial court's refusal to allow defense counsel to attempt to show through cross-examination of a witness, Mildred Crespo, that the arrest of her brother for the murder provided both the witness and her sister, another witness, with a motive to falsify their testimony deprived him of his right of confrontation. On April 3, 1975, the Appellate Division affirmed the murder conviction, reversing the possession conviction. Leave to appeal to the New York Court of Appeals was denied on May 19, 1975.

The Trial

Just before midnight on December 16, 1971, Isabel Alvarez heard a noise in the hallway outside of her third floor apartment at 827 Melrose Avenue in the Bronx. Looking through the peephole of her apartment door, Mrs. Alvarez saw one man grabbing another by the collar, while holding a knife in his right hand. Mrs. Alvarez immediately recognized the aggressor, whom she identified in court as defendant Efrain Santiago, as someone who she had seen near her building

on two recent occasions.* From a distance of approximately ten to fifteen feet, Mrs. Alvarez heard defendant, in Spanish, order his victim to "Give me whatever you have or I'll stab you" (Alvarez, 504). After the victim pleaded for his life, and stated that he had only three dollars, defendant plunged the knife into the man's left chest region and threw his prey onto the stairs** (Alvarez, 485-486, 488-489, 493-494, 503-509, 516-517, 529, 531-532, 607).

Mrs. Alvarez watched this attack for a period of approximately four minutes, during which time she observed defendant's face from different angles, including several full-faced views. After witnessing the stabbing, Mrs. Alvarez ran to her window and shouted to her upstairs neighbors, alerting them to the occurrence in the hallway (Alvarez, 486, 509-510, 515-516, 530, 532, 538, 589-593).

Upon hearing her neighbor's screams, Myrna Crespo, a twenty-three year old college student, went into the hallway

* The witness stated that she had seen defendant earlier that same day standing in front of the grocery store, which was located in her building. She also recalled seeing defendant at this location three or four days before the crime (Alvarez, 489-492, 555-561).

** Dr. Rho, an Associate Medical Examiner, testified that Manuel Perez, Jr. died as a result of four stab wounds in the chest which pierced his heart and lungs (Dr. Rho, 741-746).

outside of her fourth floor apartment and looked over the stairway railing. From a distance of approximately ten feet, she observed the aggressor, whom she identified in court as defendant Efrain Santiago, holding his victim against the wall and throwing him onto the staircase. As the defendant moved his victim around, Myrna observed both the right and left sides of defendant's face. In addition, the defendant looked up as he threw his victim onto the stairs and, at that point, Myrna was able to see his entire face for several seconds. Myrna saw the knife in defendant's hand and heard the defendant say "Shut up. Shut up... I am going to kill you." as his victim begged for mercy. Myrna witnessed this incident for approximately two minutes but did not actually see defendant inflict any of the four stab wounds upon the deceased (Myrna Crespo, 618-622, 624-631, 634, 640-649).

Myrna returned to her apartment as her twenty-one year old sister, Mildred was exiting. Myrna told Mildred to go back inside the apartment, but the latter wanted to see what was happening. When Mildred leaned over the railing, she observed a man lying on the stairs as another man, holding a knife, went through his pockets. She immediately recognized the armed aggressor, whom she identified in court as defendant

Efrain Santiago, as someone who she had stood next to for five minutes, a week earlier, in the downstairs grocery store. Mildred observed the incident for approximately five minutes until defendant straightened up, put his knife into his pocket, and went down the stairs. Although Mildred could only see the defendant's moustache and goatee as he went through his victim's pockets, she was able to view his entire face for approximately seven seconds when defendant straightened up to leave the building (Mildred Crespo, 705-715, 718, 720-722).

When Mrs. Alvarez returned to the peephole, the defendant and his victim were no longer in view. Upon looking out of her window, Mrs. Alvarez observed defendant walking out of the building and turning the corner onto 160th Street (Alvarez, 514-515).

Sometime after the police had arrived, and the body of Manuel Perez, Jr. had been removed from the building, Mrs. Alvarez went upstairs to the Crespo apartment. At approximately 1 a.m., the detectives arrived and Mrs. Alvarez

told the officers that she had seen the assailant earlier that same day. In addition, Mrs. Alvarez gave them a description of the assailant, which she was to repeat to the officers later that morning, as being a "male, white, Puerto Rican, black hair, Fu Manchu moustache, long scar on left side of neck, short black jacket, long bladed knife."* The next day, upon returning to the scene of the crime, Detective Hughes also received descriptions of the assailant from the Crespo sisters. These descriptions were similar to that supplied earlier by Mrs. Alvarez (Alvarez, 487, 542-552, 594, 598; Myrna Crespo, 653-658, 680-681; Mildred Crespo, 726-728; Hughes, 757-760, 763-776).

The next night, December 18, 1971, at approximately 11 p.m., the Crespo sisters saw defendant standing in front of their building. Mildred was able to see defendant's face

* At the time of his arrest, defendant had a long scratch on the left side of his neck (hughes, 783).

from their window, and Myrna was similarly sure that it was indeed the murderer* (Myrna Crespo, 668-678; Mildred Crespo, 723-726).

On the night of December 18, 1971, Efrain Santiago was arrested for the murder of Manuel Perez, Jr. At the 42nd precinct, defendant made a statement to an Assistant District Attorney in which he admitted being in the area of 160th Street and Melrose Avenue until 11:45 p.m. on the night of December 16. Defendant stated, however, that he then walked home, arriving there at midnight, at which he was greeted by members of his family (Hughes, 761-762; People's Exhibit #2, 785-786).

At trial, all three prosecution eyewitnesses testified that defendant had now altered his appearance by shaving off his beard and reducing the length of his sideburns.** In addition, the Crespo sisters each stated that they had no prior criminal involvement. However, Mrs. Alvarez related that although she had never been convicted of a crime, she had once

* Mildred testified that, at this point, she told her brother and her brother, along with Benjie Perez, went to the police. Neither Myrna nor Mildred contacted the police directly (Mildred Crespo, 726; Myrna Crespo, 677). They had no telephone (Alvarez, 567).

** At the Identification hearing, Mrs. Alvarez and Mildred Crespo related that they had each picked out defendant's picture at the photo-identification procedure run by Detective Hughes. At trial, Myrna, on cross-examination, stated that when shown the folder of pictures by Detective Hughes, she had picked out two of them, one of which was the defendant (Myrna Crespo, 661-663).

stabbed a man in self-defense (Mildred Crespo, 712-713, 715; Myrna Crespo, 622, 631; Alvarez, 492, 517-518, 569-576).

The District Court Application

The sole basis for petitioner's application in the District Court was his claim that he was denied his constitutional right to cross-examine a prosecution witness, Mildred Crespo, during his state criminal trial, concerning her possible interest in the case. This argument stemmed from the following interchange at trial:

"Q. You have a brother by the name of Pewee?

A. Yes.

Q. And did you learn between the time of the night of the incident and the time you spoke with Detective Hughes for the first time that Peewee had been arrested for this homicide?

MR. FILLEECE: Oh, I object to this question.

MR. GETZ: I asked her if she learned it. If she didn't learn it, she could say no.

THE COURT: Did you ever hear that?

THE WITNESS: That he was arrested? No.

Q. Did you learn he was taken to the station house about this incident?

MR. GILLECE: Hold on. I object to this now.

THE COURT: Sustained.

MR. GETZ: That's a term of legal art, Judge.

THE COURT: Not it's sustained.

* * *

Q. Did your brother ever tell you that he had been taken to the station house to be questioned with reference to this homicide?

MR. GILLEECE: Objection

THE COURT: Sustained

MR. GETZ: No further questions.

(Mildred Crespo, 730-732)."

The First Opinion of the District Court

The District Court held that the trial court's failure to allow further inquiry on the subject of Mildred Crespo's bias stemming from her knowledge of her brother's arrest deprived appellee of his right of confrontation notwithstanding that she had answered in certain and unequivocal terms that she did not know of the arrest of her brother and that defense counsel asked no further questions concerning any arrest of her brother. The Court stated there was a good faith basis for the cross-examination since Isabel Alvarez had testified at a pretrial Wade hearing that Mildred's brother, Pee Wee Crespo, had been taken to the stationhouse.

Although Mildred Crespo was the third witness to identify the defendant, the District Court went on to conclude that her testimony was a "crucial link" in the conviction of Efrain Santiago and that knowledge of her brother's

arrest for the offense could have seriously undercut her credibility as a government witness. The Court ordered that petitioner be discharged from custody unless the State of New York accorded him a new trial within 60 days of the issuance of the District Court mandate.

The Appeal to this Court

Appellant appealed this decision. On February 22, 1977. This Court affirmed the District Court judgment on the opinion of Judge Gagliardi. Appellant moved for reargument claiming, inter alia, that the trial record was insufficient to establish any prejudice to appellee because he was not permitted to cross-examine Mildred Crespo further. Appellant pointed out that the District Court had before it affidavits from defense counsel and his secretary which merely raised a factual question as to whether Mildred Crespo ever believed her brother had been taken into custody and was a suspect in the case. On June 6, 1977, this Court granted appellant's petition for rehearing and withdrew the order affirming the judgment without prejudice and remanded the case to the District Court for a hearing.

Appellant moved to reopen the case in the District Court. This application was granted and a hearing was held.

The District Court Hearing

Detective Hughes testified that in the very early morning hours of December 17, 1971, 12:20-12:25 A.M., he responded to a homicide call at 827 Melrose Avenue, Bronx, New York. He was the officer in charge of the homicide investigation. (11) When he reached the scene, the deceased had already been removed to Morrisania Hospital. He went to the hospital, looked at the deceased and then returned to the scene to do some investigating.

He spoke to Isabel Alvarez. The homicide had happened outside her apartment (12). She gave a physical description of the man she had seen stab the deceased, Manuel Perez (13). He also spoke to two sisters, Mildred and Myrna Crespo. One gave him a description of the assailant (13). He returned to his office and worked until 8 A.M. that morning. He then went back to the scene tht morning or in the afternoon. He learned at that time that the assailant's name was Frankie (14). He worked until later that day and then went home to get some sleep (114).

On December 18, 1971, Saturday morning he went back to the scene (115). He spoke to Peewee Crespo and Benjamin Perez (15-16). He was not sure where he first spoke to them. It was either in Isabel's apartment or upstairs (16, 105-106). He also spoke to them at the 42nd squad office (105-106). He was aware that Perez knew Frankie at this time (106). Later that night, while at home, he got a call that Frankie had been picked up. He went to the station and arrested him that night (17).

Mildred Crespo testified that after the homicide Detective Hughes came to her apartment looking for Isabel Alvarez (59). She told Detective Hughes what the man looked like who was in the stairwell (59). About three days later, she saw him in front of her house. She told her brother and he called the police (60).

Mildred stated she spoke to Mr. Getz, one to three weeks before the trial in her house. He came with his secretary who spoke Spanish (61). She never told him that her brother had been taken into custody by policemen investigating the death and that she was aware of this

prior to giving information to the police in regard to the crime* (62).

She heard Isabel tell the Detective about the crime. She gave a description to Detective Hughes after Isabel did but she was not sure when. It was either right after the murder or later that day (64-65). Isabel told the police that she and her sister had seen the homicide (66).

Her brother had never had any trouble with the law (66-67). Mr Getz asked her only what she had seen of the homicide and did not ask about her brother (71).

She never told anyone her brother was a suspect in the case. She never saw him in a police car. She knew her brother had spoken to Detective Hughes. She doesn't know about what. She never believed her brother was a suspect in the case. She did not speak with Isabel about the homicide after it occurred (78).

* This statement was taken from an affidavit of Mr. Howard Getz which was submitted to the District Court. At the hearing, the Court put the burden of going forward on the respondent. Accordingly, respondent was put in the peculiar position of rebutting affidavits and then hearing the testimony of the individuals who had submitted the affidavits.

Myrna Crespo also testified (79). She is a student in criminal justice at John Jay College (80). She spoke to Mr. Getz. He came to her house with his secretary around the time the trial started (80). Her sister was in the apartment. Her brother was in the bathroom. Mr. Getz didn't ask her anything about the crime. He asked her brother if he was arrested or detained at the police station. Her brother said, "No" (81). They did not speak to her or to her sister in her presence (82).

She never told Mr. Getz or his secretary that her brother was arrested and taken into custody and that she was aware of this fact prior to testifying (82).

No one ever told her that her brother was taken into custody or arrested. She never saw him in a police car (83).

She translated for Isabel when the detectives came after the homicide. There was a Spanish detective but she helped out. She heard the conversation between Isabel and Detective Hughes. She didn't give her description at that time (84). Her sister could have; she doesn't know (85).

Myrna confirmed her sister's testimony that they did not speak about the crime when Isabel came to the apartment. Isabel was very excited and the children were crying (87).

Mr. Getz testified that he went to the Crespo apartment on February 15, 1973 with his secretary Carmen Simeonides (90). He saw Mildred and Myrna and their brother Peewee (91). This was thirteen months after the homicide. He said he was informed by the two sisters that their brother had been taken into custody, detained. Peewee told him he was not arrested, that he had simply been asked to come down to the station house and was asked some questions.

He couldn't distinguish Mildred from Myrna Crespo (95). Peewee described the person who had done the homicide according to the police and in Mr. Getz's opinion, "The both of them looked very much alike, Peewee Crespo and the defendant, at the time." (96)

Carmen Simeonides testified (97) that the sisters said the brother was at the police station in connection with the homicide under investigation. She couldn't distinguish one sister from the other (99-100). She doesn't know if the sisters knew that their brother had talked to the detectives

before or after they gave a description to the police. Peewee said he had been at the police station (101).

Isabel Alvarez saw the policeman after the murder (119). At 4 A.M., her husband, Benjamin Perez, came home with Peewee Crespo (122). Two days later - two days after the murder, in the morning, her husband and Pee Wee Crespo were arrested; she did not see them arrested; they told her they were arrested (127, 130).

Benjamin Perez also testified. He saw Peewee Crespo who told him that he had been arrested and the police were looking for him (4). He said he spoke to Mildred that same day and she told him the police were looking for him (4). Mildred told him the police had beaten up her brother (5). Perez said the police beat him up too (5).

On the cross examination he denied being convicted of a crime (6). When confronted with the fact that he was currently serving a life sentence for a narcotic conviction, he finally stated it was so. He admitted, under questioning, that he had also been convicted of stealing a car in Yonkers (7-8). He knew why he was testifying, having been spoken to by Mr. Williams and Mr. Basis of the Legal Aid Society. They had

given him a lot of information. The night of the murder, he came home around 5 A.M. Yet he got up at 8 A.M., had no place to go and just stayed around. He went to see some relatives and returned after 12 o'clock when he was arrested (12). He is currently working as a gas station attendant as part of the State work release program (13).

It was stipulated by appellee that if Detective Hughes were recalled, he would testify, he did not beat anybody up (14).

THE SECOND DISTRICT COURT OPINION

The District Court characterized the key question requiring the Court to reopen the hearing as whether, in fact, there was any good faith basis for inquiring into Mildred Crespo's possible bias or motive to falsify her testimony because of her thinking that her brother had been arrested or was a suspect in the investigation of the murder in question.

The Court states that the testimony at the state court trial and the habeas corpus hearing sufficiently establishes that there was good faith basis for believing that Mildred Crespo may have thought her brother had been arrested or was a suspect and that this belief existed at the time she first came forward to describe the assailant. The Court states that Peewee Crespo spoke to Detective Hughes in the early morning hours of December 17, 1971 and that Mildred did not describe the assailant until later that afternoon.

The Court states that it is basing these conclusions on testimony at the habeas corpus testimony of Mildred Crespo, Benjamin Perez and Isabel Alvarez. As to Mildred, the Court seized upon one statement she made to the effect that her brother never talked to her about his problems to conclude that she may have thought he was a suspect. As for

the timing of Peewee's conversation with Detective Hughes, the Court states that Isabel testified that Peewee and her husband were arrested before 4:00 A.M., a few hours after the murder and on Perez' contradictory testimony that Peewee was arrested before noon on December 17, 1977 and that he, Perez, was arrested shortly after noon.

The Court ordered the issuance of the habeas corpus writ under the terms of its prior decision.

ARGUMENT

SINCE THE DISTRICT COURT DID NOT FIND BY A PREPONDERANCE OF THE EVIDENCE THAT MILDRED CRESPO BELIEVED HER BROTHER WAS A SUSPECT WHEN SHE DESCRIBED THE APPELLEE TO THE POLICE, THAT COURT ERRONEOUSLY GRANTED THE APPLICATION FOR A WRIT OF HABEAS CORPUS.

It is readily apparent from its opinion that the District Court ignored the key question in this habeas corpus application - whether the respondent proved by a preponderance of the evidence that Mildred Crespo believed her brother was a suspect in the homicide and had a reason to falsify her testimony such that he was denied his right to "effective cross-examination", Davis v. Alaska, 415 U.S. 308, 317 (1974) (emphasis supplied). As appellant pointed out in the previous appeal, the right of defense counsel to cross-examine a witness is "[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation...", Davis v. Alaska, supra, 316, and to prove a constitutional violation the appellee must demonstrate by a preponderance of the evidence that at the very least "relevant and important facts bearing on the trustworthiness of crucial testimony" were kept from the jury.* Gordon v. U.S., 344 U.S. 414, 423 (1953).

* The review by the federal courts of the state court's rulings on relevancy and materiality must be accompanied by recognition of the limited function of the federal court upon the application of federal habeas corpus. It appears that here the District Judge was substituting himself for the state trial judge whose rulings even on direct appeal "will not be disturbed absent a clear showing of an abuse of discretion." United States v. 110 Bars of Silver, 508 F. 2d 799, 803 (5th Cir., 1975), cert. denied sub nom, Resnick v United States, 423 U.S. 861.

Instead of making the necessary findings, the District Court opinion focuses exclusively on whether there was a good faith basis for cross-examining Mildred Crespo as to whether she believed her brother to be a suspect in the homicide, an inquiry which goes to the belief of the appellee's trial attorney when he cross-examined Mildred Crespo,* and the Court granted appellees application on the mere finding that Mildred Crespo may have thought when she described the assailant to the police that her brother was a suspect in the murder.

The insufficiency of this finding is made clear in another part of the District Court's opinion. Judge Gagliardi states:

"[T]he Court concludes that because of Mildred's possible state of mind at the time she first told the police that she had seen the murder, petitioner has a good faith basis for carrying out extensive cross examination on the issue of her bias or motive to testify falsely."
(emphasis supplied).

The Court, thus, does not find any important fact that was kept from the jury. In Davis it was undisputed that the witness was on probation after a juvenile delinquency adjudication for burglary. There was thus some undisputed fact

* At this juncture, such inquiry is beside the point and curiously, although the District Court characterizes the issue as one of good faith, the District Court does not discuss the testimony or belief of appellee's trial attorney at all in reaching its decision to grant the writ. As discussed infra p. 31, the habeas corpus hearing make clear that the trial attorney harbored no belief that Mildred Crespo was biased when she identified the appellee. He was merely elaborating on his misidentification theory.

from which a jury could draw some inference of bias. See also United States v. Duhart, 511 F. 2d 7 (6th Cir., 1975), cert. den., 421 U.S. 1006 (1975).

Moreover, Mildred Crespo, unlike the witness in Davis v. Alaska, supra, was not a "crucial" link in the proof of appellee's murderous act. She was the third and last witness to identify the appellee. Her testimony was merely cumulative. Isabel Alvarez had seen the murder and identified the appellee with certainty and without hesitation. Myrna Crespo also identified him. Appellee made no attempt to conceal his identity. He wore no mask and he had frequented the vicinity before the murder. Isabel had seen him in front of the building on two prior occasions. She recognized him. In addition, he admitted to being at the scene at the time of the murder. Boyd v. Henderson, 555 F. 2d 56 (2d Cir. 1977); United States v. McGhee, 488 F. 2d 781 (5th Cir. 1974), cert. den. 417 U.S. 949 (1971).

Even the District Judge's characterization that there was a "possibility" that Mildred believed her brother to be a suspect when she described the assailant is unsupported by the record which conclusively demonstrates that Mildred never believed her brother to be a suspect, which he was not. Further, Mildred had already given a description of the appellee to Detective Hughes prior to the time the detective spoke to her brother and asked him to come to the station house.

Mildred Crespo testified over and over again at the hearing that she did not believe her brother was a suspect. Her sister stated the same. Yet, surprisingly, the Court seizes upon her statement at the hearing that her brother never talked to her about his problems to hold that she might have thought he was a suspect, an argument without foundation to say the least.

Contrary to the observations of the District Judge, Mildred Crespo never indicated any concern whatsoever that her brother was a suspect. She stated she knew her brother had spoken to Detective Hughes at some point but did not know what they had discussed. Although, in response to a question from the Court as to whether he ever talked to her about going to the stationhouse, she stated "No, he would never talk to me about his problems", as the questioning continued, and she was further asked if her sister ever talked to her about her brother's problems, she became puzzled, looked at the judge and asked, "Which problems?" (H111). In short, as far as she was concerned, Peewee had no problems and she had no idea what the judge was even talking about.

The District Judge goes on to find that Mildred Crespo described the assailant to Detective Hughes no later than the afternoon of the murder, December 17, 1971. The Court then relies on the testimony of Isabel Alvarez and Benjamin Perez for the statement that there is a likelihood that her brother spoke to Detective Hughes in the early morning hours of December 17, 1971, prior to the time Mildred gave her description to Detective Hughes.* But the testimony of Isabel Alvarez was to the contrary, and, moreover, the testimony of Benjamin Perez, a convicted felon, and Isabel Alvarez conflicted with one another's and certainly could not support the finding Judge Gagliardi made.

Isabel Alvarez testified several times that the "arrest" of Peewee Crespo took place two days after the murder, on Saturday, December 18, 1971.**

"Q. You testified in cross examination that your husband and Mr. Crespo had been arrested?

A. Yes they were arrested.

Q. When were they arrested, Mrs. Alvarez?

* Mildred and Detective Hughes both stated that this description could have been given earlier in the morning, right after the murder.

** Since the murder occurred late Thursday night or very early Friday morning, she appropriately characterizes this as two days later.

A. Two days later.

Q. Two days later than what?

A. Two days after the accident had occurred.

Q. What accident?

THE COURT: The murder?

THE WITNESS: Yes, the murder?

Q. Two days later. O.k. Did you see them arrested?

A. No. (H 127)

* * *

On recross Isabel Alvarez added:

"Q. But your husband told you at 4:00 a.m. that he and Crespo had been already questioned about the murder.

A. No, they didn't tell me anything about that.

* * *

A. No, they didn't arrest them that night.

* * *

THE WITNESS: Two days later. Two days later he was arrested at 11:00 o'clock in the morning and he had been beaten.
(H 130-131) "

She did not see them arrested, but knew that they were, because, "they had said that they had been arrested at that time." (H 132).

The Court glosses over all this testimony and instead quotes the following testimony of Isabel Alvarez from the habeas corpus hearing transcript to support its statement that Peewee Crespo was arrested in the early morning hours of December 17, 1971:

"Q. Some time after you spoke to the police the first time your husband came home at 4:00 a.m., correct?

A. [Isabel Alvarez] Yes.

Q. Who came home with him at that time?

A. Crespo.

Q. What was his whole name, Custodio?

A. Custodio [Peewee] Crespo.

Q. Did they tell you that they had been arrested by the police for the murder?

A. Yes.

Q. They told you that the police thought they had committed the murder?

MS. SILVERMAN [Assistant Attorney General]:
Objection.

THE COURT: Overruled.

A. Yes.

Q. Where did Peewee go after he left your apartment?

MS. SILVERMAN: Objection. There is no testimony he was in her apartment.

MR. BASSIS: She said they came home together.

THE COURT: Ask the Question.

Where was it that your husband and Custodio Crespo saw you.

THE WITNESS: In my apartment.

Q. And that was at 4:00 a.m.?

A. Yes, when my husband returned.

Q. And do you know where Peewee Crespo went when he left your apartment?

A. He went to his sisters' house.

Q. Did you talk to his sisters later that day?

A. Yes, we talked every day. I knew them.

Q. Did they know about the arrest
of their brother?
THE COURT: Did you talk to them about
the arrest of their brother?
THE WITNESS: Yes, we talked.
THE COURT: Did you tell Mildred that
her brother had been arrested?
THE WITNESS: Yes."

However, this exchange does not support the Judge's finding that Crespo was arrested prior to 4 a.m. Mrs. Alvarez simply states that her husband came home at 4 a.m. and states further, unrelatedly and in response to the next question, that he told her he was arrested. These statements bear no relation to one another in time as Mrs. Alvarez' complete testimony makes clear. This testimony of Isabel Alvarez was confirmed by Detective Hughes who testified he spoke to Peewee Crespo and Benjamin Perez two days later, on Saturday (15-16). He did not speak to them sooner since he did not learn until Friday afternoon from Isabel Alvarez that Perez knew the assailant. When Perez came home after the murder, Isabel described the murder she had witnessed and the assailant and Perez told her that it was "Frankie".

As for Benjamin Perez, his testimony was completely fabricated and Judge Gagliardi, as he strove to adhere to his earlier opinion, was in error when he relied upon it. Under

cross-examination, Benjamin Perez denied he had ever been convicted of a crime. When confronted with the fact that he was currently serving a life imprisonment term, he reluctantly admitted his involvement with the law. He further indicated his irritation with law enforcement authorities, stating that he had had to serve time on a Yonkers conviction, for stealing a car when his three companions in crime had jumped bail and escaped free.

He testified that he returned home on December 17, 1971 at 4:00 A.M. He went to bed at 5:00 A.M. Although he had nothing to do, he got up at 8:00 A.M., sleeping only three hours that night, hung around the house and then went to see a cousin. He returned just in time to see Peewee Crespo coming back from the police station. This testimony was apparently designed to fit in with appellees' theory that he vainly tried to establish at the hearing that Peewee was arrested around 11:00 A.M., Friday morning, before Mildred spoke to Detective Hughes.

Perez is on work release from State prison pursuant to New York Correction Law. He apparently preferred a

trip to the courthouse for the habeas corpus hearing this summer as opposed to reporting to the gas station where he worked as an attendant as required by the work release program. He testified that Mr. Bassis, appellee's Legal Aid Society attorney, and Mr. Williams, the Legal Aid Society investigator, had spoken to him about his testimony. They had given him "a lot of information". He apparently caught the drift of appellee's case and tailored his testimony accordingly notwithstanding that it contradicted everybody else's. He then adorned this testimony with some trimmings of his own, stating that the police had beaten both him and Peewee Crespo.* Interestingly, Isabel never even saw Crespo or Perez arrested. Her whole testimony sprang from what Perez had told her and he apparently has a fertile imagination.

Truth to tell, Mildred Crespo was not a biased witness as defense counsel always knew. Accordingly, Howard Getz, Esq., defense counsel never really made such a theory part of the overall defense strategy at trial and reasonably so.** Peewee Crespo had told Howard Getz, Esq.,

* Not surprisingly, Judge Gagliardi disregards this part of Perez' testimony.

** This opinion is obviously shared by the District Court which studiously avoids even mentioning the testimony of Howard Getz, Esq., at the habeas corpus hearing.

appellee's trial counsel, that he had never been arrested for the homicide but had simply talked to the police about the case. Mr. Getz did not believe that Peewee was a suspect or that Mildred thought so. Rather, as he made clear at the habeas corpus hearing, by his question to Mildred at trial about her brother being at the stationhouse, he was just pursuing a variant of his misidentification theory at trial. Mr. Getz testified at the District Court hearing, referring to his conversation with Peewee:

"He described the person that they had described to him as the person who committed the homicide, and in my opinion, the both of them look very much alike, Peewee Crespo and the defendant, at the time..." (H 96).

Surely if defense counsel had believed otherwise and intended to pursue a bias theory, he would have cross-examined Isabel Alvarez, Myrna Crespo, and Detective Hughes, at the very least on this theory. Moreover, under New York Law, a witness' motivation to testify falsely may be established by the introduction of extrinsic evidence, People v. Brown, 26 N Y 2d 88, 94 (1970). No foundation is even required. People v. Brooks, 131 N Y 2d 321, 325 (1892).

Richardson on Evidence, § 505 (10th Ed. 1973). Yet defense counsel never called his secretary, Benjamin Perez or Peewee Crespo to the stand.

If the District Court opinion stands, appellee now will be given a retrial to ask questions of Isabel Alvarez and, perhaps, Benjamin Perez that he was free to ask throughout his original trial and never chose to do. This will be no retrial to confront Mildred Crespo. This will be a retrial to give appellee an opportunity to try his luck with a new jury and a new lawyer on a new theory. It will permit appellee to ask additional questions of witnesses who testified at his first trial and to call witnesses that were always available and never called in the hope of developing a belatedly urged and bogus theory.

An evidentiary hearing has now been held on appellee's claim. We submit that the record of the hearing fails to afford any justification for the disposition by the District Judge. Judgments of conviction should not be disturbed by the federal courts upon the subjective, dubious deductions of the District Judge here - deductions which might not even be allowed as an argument on summation at a trial. Mildred Crespo testified at the hearing in certain and unequivocal

terms, and then retestified innumerable times thereafter at the hearing when being subjected to stern cross-examination by appellee's counsel and particularly by the District Judge that she did not believe her brother was a suspect in the case. Similarly Detective Hughes testified and retestified that, indeed, her brother was never a suspect in the case. Isabel Alvarez testified that right after the murder she went to Mildred's apartment and in the presence of Mildred and her sister, Myrna, described the assailant to the police. Mildred Crespo thus knew from the outset that the only eyewitness to the murder had identified an individual who was a stranger to them both.

The District Court has now ordered a retrial of the appellee, presumably to give the defense an opportunity to establish that Mildred Crespo was biased and had some ulterior motive in identifying the appellee as the murderer simply because Benjamin Perez, an inveterate liar, told his common-law wife Isabel Alvarez, two days after the murder, that he and Pee wee Crespo were arrested and beaten, no less.

Mildred Crespo denies that she ever believed that her brother was a suspect. Detective Hughes confirms that he was not. Surely, Mildred Crespo has no belief that her brother is a suspect now. By its order, the District Court is putting the State of New York through an unnecessary exercise. Moreover, to try appellee at this late date might well lead to his wrongful release. As the District Court opinion makes clear, by now, memories have somewhat blurred and important police records which would be needed at retrial are missing.

Isabel Alvarez screamed out the window when she saw a senseless, violent and murderous act. Myrna and Mildred Crespo came to the landing and saw the assailant. Efrain Santiago, the appellee, was the man they saw. There was never any other suspect. Appellee has failed to prove that any further cross-examination of Mildred Crespo would have impugned the integrity of the jury verdict.

CONCLUSION

THE JUDGMENT OF THE DISTRICT
COURT SHOULD BE REVERSED.

Dated: New York, New York
October 17, 1977

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Respectfully submitted,

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